

Statement of Suzanne Iudicello
before the
Subcommittee on Oceans, Atmosphere, and Fisheries
of the
Senate Committee on Commerce, Science, and Transportation
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Good Morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify at this oversight hearing on management issues in the National Marine Fisheries Service. My name is Suzanne Iudicello; I offer my remarks today as an independent consultant in marine conservation. You have asked for views on several important management issues at the agency, including its litigation burden and the adequacy of the organizational structure to meet requirements under multiple statutory authorities. My observations on these topics are drawn from three activities in which I have participated:

- A project conducted for the National Marine Fisheries Service on requirements under multiple statutory authorities;
- The U.S. Fishery Management Program of the H. John Heinz III Center for Science, Economics and the Environment that produced the book *Fishing Grounds*; and
- Six years of service on the Marine Fisheries Federal Advisory Committee, MAFAC.

The focus of these observations is on NMFS's compliance with statutory requirements, particularly those of the National Environmental Policy Act, and whether the agency has the capacity in its budget, organization, structure and management processes to meet requirements under multiple statutory authorities and national policies. It is my view that the system for effective stewardship and procedural compliance exists, but isn't always implemented well. For the most part, the system does not need to be changed; the extent and amount of tools and resources we give NMFS to operate in the system, however, does require change. Finally, as the Subcommittee moves from its oversight role to legislative deliberations over the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act, there are some changes I recommend you consider. These lie not in the realm of nuts and bolts, ever more prescriptive details, or ratcheting down timetables, but rather in clarifying national policy and articulating what we think the future of fisheries in America should be.

Litigation is part of the system, not an indication that the system is broken

Reading fishing industry publications and listening to the complaints and hand-wringing of officials and commentators over the past couple years, I get the impression there is an odd notion afoot in the land that we have somehow become a government of two functions, not three, and that the courts are no longer—or shouldn't be—part of the old “checks and balances.” I must respectfully disagree. Litigation, seeking redress in the courts, is part of our system, not an indication that the system is broken.

It is true that the system and the rules changed significantly in 1996, and that litigation over compliance with those rules has taken a heavy toll on the National Marine Fisheries Service. Many of the changes that were advocated by the conservation community in passage of the Sustainable Fisheries Act were precisely for the purpose of providing litigation handles on what previously had been a slippery, unaccountable and largely discretionary system. The law now includes specific targets, timetables, and concrete requirements to stop overfishing, reduce bycatch and protect essential fish habitat. It should not have come as a big surprise that when the new law's deadlines and targets were not met, advocates used litigation to hold the agency accountable, and that environmental groups are responsible for about a third of the action in the courts.

What is important to note about environmental group litigation is that while it may be new for the National Marine Fisheries Service, it is not new in the history of natural resource management. NMFS is about 10 years behind the U.S. Forest Service, National Park Service and other resource managers in suffering through litigation, particularly challenges to its analysis of the impacts of fishery management actions required in the Magnuson-Stevens Fishery Conservation and Management Act, National Environmental Policy Act, Regulatory Flexibility Act and various Executive Orders. The agency finds itself in what one NEPA expert has described as “Stage II” in the evolution toward compliance, a stage that occurs after numerous court orders and injunctions, where money is made available for contractors and consultations, detailed prescriptions emerge from general counsel, and the agency does enough to demonstrate that it is trying to respond to litigation. NEPA managers in these other agencies can tell you that what the Fisheries Service is experiencing now is familiar ground, and that there are ways to improve performance, comply with the laws, and get resource management done. We can learn from the experiences and approaches tried elsewhere, even if it seems at times the only relevant lesson is “you are not alone.”

The good news is that the National Marine Fisheries Service is no longer in “Stage I,” or denial that NEPA applies to fishery management actions. The agency has undertaken numerous activities to tap experience of other resource agencies, use the planning and brainstorming ingenuity of its own and council staff, and employ resources provided by Congress to expand training in NEPA and other procedural requirements, improve consistency in document preparation and get tough on the quality of decision record that will be approved.

This progress should not be thwarted by attempts to exempt the agency from NEPA or to declare that the Magnuson-Stevens Act public participation and decision process is equivalent to NEPA. The two laws are not inconsistent, and in fact are comparable in their policies. But the fishery management planning process and the environmental impact assessment process are neither the same nor redundant. The purpose of a fishery management plan or amendment is, at the most basic level, to authorize fishing. The purpose of an environmental impact statement is to provide decision makers and the public with a full exposition of the alternatives and consequences of authorizing fishing in the manner proposed in the plan. It does not seem unreasonable that decision makers at the council and in the agency would want to know the potential effects of a fishery management proposal on not just the target stock, but related fish, other animals in the ecosystem, the market, participating user groups, communities and so forth. And while fishery management plans do incorporate information about all these aspects of the human and natural environment, they do not provide the alternatives analysis that is the heart of a well-prepared EIS. Whether it is a vote by a council or final approval of a plan by the Department of Commerce, the fishery management plan process does not, without NEPA, provide a mechanism whereby the decision maker and the public can evaluate an array of alternatives and their consequences.

The difficulties in merging the respective steps of fishery management and environmental impact analysis lies, in my opinion, not in some incompatibility of the two statutes or processes, but in lack of clarity about roles and responsibilities for decision-making between NMFS and the fishery management councils. Who is the decision-maker? When is a proposal a decision? To what action does the alternatives analysis apply? How many alternatives? Are they alternatives to authorizing fishing or just alternative catch levels? Are there really alternatives if the council has already voted? Can the agency analyze alternatives the council has not put forward? These are not insignificant issues, and the agency has begun to tackle them under the leadership of Dr. Hogarth, who has made it

clear to the councils that the documents they produce will be sent back if they don't pass muster.

Stop the world, I want to get it right

Dr. Hogarth has noted in numerous venues that he would like to call a time out, not just on litigation, but on council action, agency action, all of it, so NMFS could catch its breath and have a moment in which it was not responding to crisis. It reminds me of the old tune "Stop the World, I Want to Get Off." In this case, a better title might be, "Stop the world, I want to get it right." There are lots of ideas for doing a better job, there is just no time to flesh them out or test them.

Recognizing that litigation is part of our system, nevertheless, it does have the effect of trumping all other activity, not only for the agency, but for stakeholders. Once the agency is in court, it no longer has the flexibility to try different approaches, convene stakeholders for negotiation, or work with councils to improve background and analytical documents. If an organization is not a plaintiff or intervenor, it doesn't have a seat at the table or a role in crafting solutions. Once suit is filed, participants are either on the docket or on the sidelines. Not only does this not elicit diverse ideas, it sucks up agency resources that are desperately needed to conduct basic business, let alone plan ahead or think creatively to find ways to integrate disciplines and mandates.

In the past year, internal and external assessments, consultations, workshops and strategy sessions have generated notebooks full of ideas and possible approaches the National Marine Fisheries Service could explore to improve its performance under NEPA, the Endangered Species Act, Regulatory Flexibility Act and other mandates. Many of the suggestions are actions NMFS can implement itself, or in conjunction with general counsel at both NOAA and Department of Commerce levels. Some will require coordination and cooperation with the regional fisher management councils. Some ideas need more work and investigation. Other resource agencies and the Council on Environmental Quality have offered their experience and assistance in such endeavors, including technical assistance to better blend and find more flexibility in the timing requirements of environmental impact statement and fishery management plan development. This Subcommittee and its counterpart in appropriations have provided resources for responding to court-ordered document preparation and improving overall NEPA performance.

These actions are all to be commended, but they are not enough. At the risk of sounding as

though more money is the only answer—and I don't believe it is—I must still observe that the resources provided the National Marine Fisheries Service are not sufficient to meet the basic requirements of the Sustainable Fisheries Act, let alone be fully responsive to environmental and economic impact analysis required by NEPA, the Regulatory Flexibility Act, and Executive Order 12866 (economic impact of regulations). When Endangered Species Act compliance enters the picture, the resource burden is even greater, and the basic infrastructure is even farther behind the funding curve. For example, although agency and council staff and officials agree that having regular participation of staff from the Office of Protected Resources in fishery management planning discussions would improve background documents, information exchange, and understanding of recovery goals, they recognize current resources make this impossible.

But even if we had sufficient fiscal and personnel resources, there are still policy issues for the Congress to resolve.

Looking Ahead: Articulating National Policy

When the Heinz Center embarked on its fishery management project several years ago, one goal was to produce a book that would capture information and ideas relevant to the reauthorization of the Sustainable Fisheries Act in 2000. Dozens of interviews, decades of collective experience, numerous meetings, reviews, comments and reactions to discussions of fishery management were brought together in the book *Fishing Grounds*. I think I can speak for my co-authors Susan Hanna, Heather Blough, Dick Allen, Bonnie McCay and Gary Matlock in saying we appreciate the opportunity to share some of the ideas and voices of *Fishing Grounds* with you as you begin your deliberations on the Sustainable Fisheries Act. I would also like to thank the Heinz Center for making copies of the book available to Subcommittee Members.

Despite—or perhaps because of—the diversity of the contributors to the project, common themes emerged, cutting across issues, interest groups, regions and fisheries. How can we best learn from our experience and integrate complex management objectives? How can we create expectations for stewardship, maintain the diversity of fisheries, and still make the transition to sustainability?

As noted above, much of what has drawn the fire of litigation has occurred because we have not been successful at integrating management objectives. The Magnuson-Stevens

Fishery Conservation and Management Act should be reviewed in conjunction with other important marine statutes to see if we can integrate the entire system in a way that improves coordination, reduces conflict, and moves toward ecosystem-based approaches to fishery management. That is not to say that fishery law can replace NEPA or the Marine Mammal Protection Act or the Endangered Species Act, but perhaps it is time to consider comprehensively what are our national goals and policies for the marine and coastal environment? How can integration across disciplines, regions, agencies, and jurisdictions be encouraged?

One of the pitfalls of environmental impact analysis, stakeholder participation, best available science and all the other terms, concepts and buzz words we use to talk about fishery management is that we often assume that information will set us free. “If we just get more data, better stock assessments, clearer understanding of ecosystem relationships, *then* we’ll get it right and nobody will challenge the outcome.” Although I would be the last to say we need not do a better job at information gathering and management, this view leaves out completely the importance and effect of differing societal values on fishery management decision making. Even if we had every last scintilla of information about Steller sea lions, pollock, Northern fur seals, climate change in the Bering Sea, and the complete set of food web relationships from tube worms to school lunch fish sticks, these facts would not resolve the differences in point of view that are at play in the North Pacific. That does not mean we cannot act, or that we cannot manage. It means that we must take into account values as well as numeric and objective information, and that our decision processes must make room for debate over goals and expectations as well as how many fish, where, by when, at what price and by whom.

The critical task for which neither the agency nor the councils have had sufficient time is an exploration and reconciliation of our expectations and goals for American fisheries. Management and allocation of scarce resources cannot be all things to all people. Short-term benefits or long-term ones? Managing for continued participation by all or for economic efficiency? Fishing as a privilege or a right? Realistically, how can they grapple with what managers and stakeholders think “success” would look like in 5 to 10 years, when everyone (and all the agency resources) is consumed with what the total allowable catch will be for the upcoming season?

One possible way to carve out time for that kind of consideration would be to grant Dr. Hogarth’s wish for a “time out.” Another might be to have a national conversation about it during the reauthorization. If we were to engage in that conversation at a level aimed at

articulating a national policy, and creating consistent expectations for stewardship, I offer these major policy choices and reauthorization issues identified by contributors to *Fishing Grounds*:

- Define “greatest overall benefit to the nation”
- Develop a strategy to reduce fishing capacity
- Resolve access to fishery resources
- Resolve the individual fishing quota moratorium
- Develop clear allocation criteria
- Clarify the respective roles of the regional fishery management councils, their advisors, the National Marine Fisheries Service, the Secretary of Commerce and Congress
- Diversify participation in the regional fishery management council system
- Consider user fees as a means of cost recovery or to provide returns to the public
- Define the role of industry in data collection and research
- Strengthen the biological scientific basis for fishery management
- Strengthen the social scientific basis for fishery management
- Develop an evaluation framework
- Strengthen education and training
- Bring fishery management incentives into line with long-term goals for fisheries

As we observed in *Fishing Grounds*: “These choices are not easy, particularly when much of what Americans value about fishing are its history and tradition—which will inevitably come in conflict with the future realities of fishing. Will we learn from this history, or cling so steadfastly to tradition that we are doomed to repeat it?”

Thank you for the opportunity to share these views. I will be pleased to answer any questions.